No. A- 740

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ALAN J. KARCHER, Speaker New Jersey General Assembly, et al.,

Appellants,

v.

GEORGE T. DAGGETT, EDWIN B. FORSYTHE, et al., JAMES A. COURTER, THOMAS H. KEAN, as Governor of the State of New Jersey, IRWIN KIMMELMAN, as Attorney General of the State of New Jersey, and JANE BURGIO, as Secretary of State of the State of New Jersey,

Appellees.

On Appeal from the

United States District Court for the District of New Jersey

MEMORANDUM IN OPPOSITION TO APPLICATION FOR STAY OF JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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To the Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Third Circuit:

Appellees Edwin B. Forsythe, et al. submit this memorandum in opposition to the application of appellants Alan J. Karcher, et al. "for a stay pending final disposition of the appeal" and for "expedited consideration" of the appeal. In opposition to this application, appellees Forsythe, et al. respectfully show as follows:

I. PROCEDURAL HISTORY

1. Appellees Edwin B. Forsythe, et al. (hereinafter "appellees") are four incumbent Republican members of Congress from the State of New Jersey, as well as other New Jersey citizens. Appellees Kean, et al. are the Governor, Attorney General and Secretary of State of New Jersey. Appellee Courter is a Republican Member of Congress from New Jersey, and appellee Daggett is a private citizen. Appellants Karcher, et al. are the Democrat Speaker of the New Jersey Assembly, the Democrat President of the New Jersey Senate, and seven of the nine Democrat Members of Congress from New Jersey. Congressman Frank J. Guarini, a Democrat Congressman from New Jersey, has declined to joint this appeal. Although Congressman Robert G. Torricelli, the remaining Democrat Member of Congress from New Jersey, is listed as an appellant in the Jurisdictional Statement (JS-11), his name does not appear on the list of those appellants who join in the instant application "for a stay pending final disposition of the appeal". (Application at 1)

2. After this Court's decision in Karcher v. Daggett and the filing of its mandate, the three-judge District Court filed an Order on Mandate on December 19, 1983. (JS App. 31a) The Order formally declared New Jersey

P.L. 1982, c.1, the statute which this Court struck down in Karcher, "unconstitutional as violative of plaintiffs' rights under Article I, § 2 of the Constitution of the United States." The Order further enjoined the state defendants from conducting any elections under P.L. 1982, c.1, and granted the New Jersey Legislature and Governor until February 3, 1984 "to enact a new constitutional plan for reapportionment." The District Court further directed in a letter to counsel that all parties submit no later than February 3, 1984 any redistricting plans which they desired the District Court to consider in the event that the New Jersey Legislature and Governor failed to enact a new constitutional plan by February 3rd. Finally, the Court's December 19, 1983 Order set the matter down for further proceedings on February 7, 1984 if the state had not enacted a new constitutional plan by February 3rd.

3. New Jersey failed to enact any new plan by February 3, 1984, and indeed has enacted no plan to this day. The Democrat-dominated Assembly and Senate passed a purportedly "new" plan, which merely tinkered with the unconstitutional P.L. 1982, c.1, and retained both the unjustified population inequality and gross gerrymandering of P.L. 1982, c.1, the plan this Court invalidated in Karcher. Governor Kean vetoed the bill precisely for those reasons, and the Legislature did not override the veto or even attempt to do so.

4. Contrary to the suggestion in appellants' application, at 4, New Jersey's failure to enact a new constitutional plan by February 3, 1984 was not the result of the

Governor's veto, but rather the result of the Legislature's failure even to pass a plan which was constitutional.

5. Moreover, there was nothing "hasty" about the February 7, 1984 hearing before the three-judge District Court. Application at 4. That date had been established seven weeks earlier in the December 19, 1983 Order on Mandate. All parties were on notice that all plans were to be submitted by February 3rd and introduced into evidence for the Court's consideration on February 7th. As of the end of the hearing on February 7th, during which all parties made oral presentations to the Court and introduced a myriad of proposed redistricting plans into evidence, as well as other exhibits, the record below was closed and the case was sub judice on that record.

6. As of the closing of the record at the end of the February 7th hearing, the so-called "Plan C" which the New Jersey Senate sought to introduce into evidence at the hearing created non-contiguous districts. The District Court's refusal to admit that plan into evidence, because it had not been submitted by the February 3rd deadline so that all parties could review it and comment upon it at the February 7th hearing, is therefore moot. Even if the District Court had admitted the plan into evidence, it could not have adopted it because of the fatal non-contiguity. The Senate's attempt to submit a "corrected" Plan by letter to the Court on February 15, 1984, more than a week after the record was closed, is meaningless. Once the record was properly closed, on ample notice to all parties, no further evidence or proposed plans could be submitted.

II. THE "APPLICATION FOR A STAY PENDING APPEAL" IS SPURIOUS, AND IN REALITY IS A MOTION FOR SUMMARY REVERSAL OF THE THREE-JUDGE COURT'S UNANIMOUS DECISION

7. Although appellants caption their application as one for a "stay pending appeal," it is not a mere stay request. The entry of a stay would leave no congressional redistricting plan in effect; what appellants really seek is the summary reversal of the District Court's decision and judgment, and a mandatory injunction requiring the implementation of a plan which the three-judge Court carefully considered and unanimously rejected in favor of the plan it adopted.

8. There is no basis for such drastic action, if indeed it is even permitted under Rule 44. If anything, this is an application for a writ of injunction under Rule 44.1. Since this Court has already declared P.L. 1982, c.1 unconstitutional, and in view of the fact that the districting plan which preceded P.L. 1982, c.1 was rendered unconstitutional by the 1980 census' decrease in New Jersey's allotment of Members of Congress from 15 to 14, the entry of a mere "stay" of the District Court's unanimous judgment would leave New Jersey with no congressional districting plan in place at all.

9. It is for this practical political reason that appellants seek far more than a mere stay. What they urge this Court to do by their application to the Circuit Justice is to enter a mandatory injunction requiring implementation of some plan which the District Court either already has rejected or which was never timely placed before it for consideration. The appeal before this Court is devoid of any

substantial federal question, and there is certainly no basis for such drastic action upon an appeal as to which there is no reasonable probability that four Justices will note probable jurisdiction. As Justice Brennan wrote in a similar context:

> Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below --- both on the merits and on the proper interim disposition of the case --- are correct.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Appellants have failed to make any such showing here.

III. THE DISTRICT COURT'S UNANIMOUS JUDGMENT WAS A WELL-REASONED APPLICATION OF KARCHER TO THE PLANS PROPERLY BEFORE IT, AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION ON THIS APPEAL

10. The unanimous District Court stated the basis of its analysis under Karcher in clear and unexceptional terms:

> While Karcher v. Daggett considers what interests may be taken into account by state legislatures in justifying deviations from the ideal of district population equality based on the decennial census, it also provides useful instruction to district courts faced, as we are, with selecting a districting plan because of a failure in the legislative process. We may take into account at least those factors which the Court has recognized as legitimate, namely: making districts compact, preserving municipal boundaries, preserving cores of prior districts, avoiding contests between incumbents, and inhibiting gerrymandering.

(JS App. 6a) The three-judge Court's application of these criteria to the plans before it justified and required its adoption of the Forsythe plan, and mandated the rejection of the plans which appellants seek to have this Court implement without argument or full consideration by this Court.

11. As the District Court noted, appellants' contention that White v. Weiser, 412 U.S. 783 (1983), required the three-judge Court to adopt appellants' plan because it was most like the unconstitutional P.L. 1982, c.1, stands Weiser on its head. This Court specifically held in Weiser that "the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge." 412 U.S. at 797, J.S. App. 8a. The District

Court found as a fact that the state policy which underlay the unconstitutional P.L. 1982, c.1, and which was carried forward in appellants' plan, "was to deviate from the norm of population equality for the patently discernable purpose of partisan advantage. That policy was not merely vulnerable to legal challenge; the challenge succeeded. We owe no deference to an unconstitutional statute." The District Court thus abided by Weiser. This Court cannot disturb that finding of fact without a showing that it was clearly erroneous, and appellants have not even attempted to make such a showing.

12. The District Court properly applied the balancing of conflicting districting criteria which was the essence of its remedial function in the absence of legislative action. See J.S. App. 11a-12a. It considered the fact that the Forsythe plan achieved a maximum population variance of only 25 persons out of districts of more than 526,000 people. Thus the Forsythe plan achieved the lowest population deviation of any plan which was before the District Court. Appellants totally ignore the evidence introduced at the hearing on February 7th. Appellees introduced evidence establishing without contradiction that the Forsythe plan achieved the most compact districts of any plan before the Court. It avoided placing incumbents in the same districts. It preserved a black majority in the Tenth District better than appellants' plan, and the District Court found as a fact that unlike appellants' plan, "[n]o evidence has been offered from which we could find that it is designed to achieve partisan advantage." J.S. App. 12a.

13. The only alleged disadvantage of the Forsythe plan, and the only real basis which appellants advance for the extraordinary relief they seek here, is that it splits two of New Jersey's municipalities in order to achieve the best population equality and most compact districts of all competing plans. The District Court unanimously found, in the exercise of sound remedial discretion, "that this disadvantage is outweighed by the advantages of compactness and population near uniformity." J.S. App. 12a. Appellants have shown this Court no reason why that finding is constitutionally infirm. Indeed, appellants themselves had submitted plans which split municipalities between districts.

14. Appellants also fail to inform this Court that the 15 New Jersey congressional districts which predated P.L. 1982, c.1, and had been used for ten years, included a split municipality: South Hackensack. See David v. Cahill, 342 F. Supp. 463, 469 (D.N.J. 1972).

15. Appellants misread Upham v. Seamon, 456 U.S. 37 (1982) in the same way as they misread Weiser. Application at 2, 7-8. In Upham, the Attorney General of the United States, under the Voting Rights Act of 1965, objected to the boundaries of two of the State of Texas' 27 new congressional districts. The Attorney General did not object to any districts in Dallas County. Only one of the three District Court Judges determined that any Dallas County district was unconstitutional. The District Court correctly modified the two districts to which the Attorney General had objected, but was held to have erred in redrawing the boundaries of the four Dallas County districts "in the absence of a constitutional or statutory violation with respect to those districts. . . ."

456 U.S. at 40. Here, neither the District Court nor this Court exempted any New Jersey congressional district from the holding that P.L. 1982, c.1 was unconstitutional. Upham therefore cannot be read to have limited the District Court's unanimous exercise of its remedial powers.

16. Appellants have failed to make the four-part showing required by Rostker v. Goldberg, supra, 448 U.S. at 1306. First, they have raised no substantial constitutional deficiency in the District Court's exercise of its remedial discretion, and have failed to demonstrate that the District Court's factfinding was clearly erroneous and that those findings resulted in a constitutionally-deficient judgment. Therefore, they cannot sustain their burden of establishing a reasonable probability that four Justices would note probable jurisdiction. For the same reasons, appellants have also failed to advance persuasive arguments "that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." 448 U.S. at 1308.

17. Third, there has been no demonstration of irreparable harm in the absence of a stay. On the contrary, it is the granting of the relief sought by appellants which would inflict irreparable harm upon the people of New Jersey, who would again be forced to select their congressional representatives from blatantly gerrymandered and unconstitutional districts. Finally, the balance of the equities is a clear one: compact districts of maximum population equality versus grotesquely gerrymandered districts engineered by appellants in defiance of this Court's own rejection of P.L. 1982, c.1. The interests of the citizens of New Jersey require that appellants' application be denied.

WHEREFORE, appellees Edwin B. Forsythe, et al. pray that appellants' application for a stay of the judgment of the United States District Court for the District of New Jersey, entered on February 17, 1984, as well as for expedited consideration of the appeal, be in all respects denied.

Respectfully submitted,

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Dated: March 17, 1984

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